No. 65

IN THE UNITED STATES

# CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

OCTOBER TERM, 1892.

BARBEE T. BLACKBURN AND SADIE M. BLACKBURN, *Appellants*,

*vs.*

CHARLES T. WOODING, *Appellee*.

*Appeal from the United States Circuit Court for the Ninth Circuit, District of Washington, Western Division.*

## APPELLEE'S BRIEF.

GALUSHA PARSONS, *Solicitor for Appellant.*

O. V. LINN, *Solicitor for Appellee.*

STATE PRINTING AND PUBLISHING COMPANY.

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*Clerk.*

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## APPELLEE'S BRIEF.

I.

This was clearly one of the causes intended by section 23 of the enabling act, for the admission of Washington and other states, in which the United States Circuit and District Courts should succeed the old District Court of the territory; and while no consent of the parties can give a court jurisdiction of a cause of which such court did not by law have jurisdiction of the subject-matter, yet this

court having been granted jurisdiction of the subject-matter and the cause, if the cause was irregularly transferred it matters not, as the respondent had a right to waive all objection to the irregularity of the proceedings. Under the provisions of the enabling act, cited above, jurisdiction was conferred upon the United States Circuit Court or else we entirely misconstrue the language of said act, and misconceive the intent of congress.

Again, if the case was not capable of being transferred from the State to the United States Court, yet if this was not a removal of the cause it was an abandonment of the cause in the State Court and the commencement of a new action in the Circuit Court. Did the complainants abandon their action in the State Court and commence a new action in the Circuit Court? They certainly did not comply or in any way attempt to comply with the requirements of the removal act. No bond was filed in the State Court, and the original files in the State Court were sent to the Circuit Court. No attempt was made in the Circuit Court to comply with the order entered in the State Court directing the filing of an amended complaint. The first paper filed in the Circuit Court was entitled "substituted

bill." This pleading, so far as its relation to any pleading filed in the State Court was concerned, was the commencement of a new action. No permission was ever granted for the filing of this "substituted bill;" what the State Court ordered filed was an amended complaint, setting forth certain things, none of which are contained in this paper. This "substituted bill" is entirely independent of any former proceeding in this action. The action begun in the State Court was entitled "B. T. Blackburn and Sadie M. Blackburn, Plaintiffs, *vs.* Charles T. Wooding, Defendant," while the action begun in the Circuit Court by the filing of this "substituted bill" is entitled "Barbee T. Blackburn and Sadie M. Blackburn, Complainants, *vs.* Charles T. Wooding, Respondent." The complainants, it is true, filed a motion for the transfer of the cause begun by them in the State Court, and that court entered an order directing the transfer of the papers, and the clerk of that court certified the papers in that cause to the Circuit Court; but after this step no attention is paid to the former proceedings. Although an order was entered in the State Court on the 11th day of June, 1890, directing the amending of the complaint on file in the cause, and

although the papers certified to by the clerk of the Superior Court of the state were filed in the United States Circuit Court on the 20th day of August, 1890, not a step was taken in the Circuit Court until the 1st day of November, 1891. What did complainants mean by this mode of procedure? Were they not playing hide and seek with the court? Were they not attempting to get this cause in such position in the Circuit Court that if decided in their favor they could claim that they had abandoned their case in the State Court and brought a new action in the Circuit Court, and if decided adversely that they could with plausibility claim that the cause should be remanded?

Respondent further contends that complainants having brought this action into the Circuit Court, having participated in the argument of the cause, and having submitted the same to the court for its decison, that this court ought not now to hear them on their motion to remand this action. If the acts of parties in court can ever estop them from questioning the jurisdiction of such court, the acts of these complainants ought certainly to have that effect.

See *Davis et al., Admrs., vs. Lathrop Rec. et al.*, 21 Blatchford, 164.

*Carrington vs. Railroad Co. et al.*, 9 Blatchford, 467.

In the consideration of this cause before this court, the first question to be passed upon is the question of jurisdiction of the cause; but, even though the court should hold that this was not a new action commenced in the Circuit Court, respondent contends that the court had jurisdiction by virtue of the provisions of section 23 of the enabling act of the congress of the United States, by which the State of Washington and other states were admitted to the union. This is a question which has not yet been passed upon by an appellate court, while the judges for the different Circuit Courts have construed this section differently. In the case of *Herman vs. McKennie*, 43 Fed. Rep. 689, Shiras, Judge, held that the Circuit Court was the proper successor to the Territorial District Court in cases of this kind; and in *Dorne vs. Richmond Silver Co.*, 43 Fed. Rep. 689, Edgerton, Judge, also held the same way. Several of the other Circuit Court judges and Judge Sawyer have held to the contrary, but respondent contends that the construction put upon this section by the judges in the two cases cited above is the one which congress intended.

It is objected that this construction is contrary to section 2 of article 3 of the constitution of the United States,

but the court in the cause last above cited holds to the contrary. This section of the constitution is not in conflict with this construction of this section, for at the time the cause would come under the jurisdiction of the Circuit Court it had become a "controversy between the citizens of two different states."

The whole question then turns on the construction to be given to section 23 of the enabling act, should the court hold against respondent in his first two positions. When congress in said section uses the expression, "whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts, respectively, shall be the successors of said Supreme and District Courts of said territory," it evidently intended to be supplied the words, "and had such territory been a state at the time of the commencement of said action." "Under the laws of the United States, as they then existed," such courts could not have been established unless it was within the territory of a state. It must be admitted that congress intended to refer to the laws of the United States

as they then existed, and no such thing was known to the laws of the United States at that time as a Circuit or District Court within a territory. If such courts had existed within the boundaries of the now State of Washington, under the laws of the United States as they then were, the said territory must have been a state at that time.

It may also be contended that the complainants, having taken active steps in the State Court after they might have asked for the removal of the cause to the Circuit Court, that the cause could not afterwards be transferred, but the enabling act fixes no time within which the application shall be made. In the case of *Strassberger vs. Beecher*, 44 Fed. Rep. 209, the court held that the time when the application for the transfer was made is immaterial if made before trial. See, also—

*Carr vs. Fife*, 44 Fed. Rep. 713.

And respondent further contends that this is a question that cannot be raised by appellants, they being the parties asking for the transfer.

## II.

In replying to the second assignment of error by appellant, respondent contends that the finding of the lower court is correct, for the following reasons: Complainants knew that when the negotiations for the sale of this land began that respondent believed Barbee T. Blackburn to be the sole owner thereof, and that in his negotiations for the purchase thereof he was relying upon that belief, and yet neither of complainants enlightened him as to the fact that there was an outstanding undivided one-half interest vested in the heirs of the former wife of said B. T. Blackburn.

From the evidence it was clearly the purpose of complainants to defraud the respondent by selling to him a half interest in the property, and obtain his money from him under the belief that he was receiving a good title to the whole tract. Both complainants were fully cognizant of all the facts pertaining to the case, and knew that their actions were fraudulent.

In view of these facts they are not entitled to relief at the hands of a court of equity, even if respondent had

been guilty of the fraudulent acts with which they charge him, for they do not come into court with clean hands.

But the evidence does not show that respondent was guilty of any fraud. Complainants have failed to prove that there was any contract for the execution of the two deeds for the entire sum of $14,489. In fact, all the evidence shows that Cheatham, the attorney in fact for Sadie M. Blackburn, told C. E. Jameson, the broker through whom the sale was being negotiated, that Barbee T. Blackburn was ready and willing to carry out his contract for the sale of the section of land for $6,000, as far as it lay in his power to do so; that the only reason he could not do so was that his wife, Sadie M. Blackburn, refused to convey her interest in the land for the one-half of that sum; that Barbee T. Blackburn was willing to convey his half interest therein for the one-half of said sum, or $3,000. During all of this time complainants well knew that Sadie M. Blackburn had no interest to convey.

Complainants contend that there was one contract for the execution of two separate deeds for the entire sum of $14,489, and that respondent failed to fulfill the whole of the contract; but if there ever was any agreement to pay

to Sadie M. Blackburn any sum whatever for a deed from her to respondent, it was a separate agreement and had nothing to do with the contract between Barbee T. Blackburn and respondent. All the testimony confirms this view of the case. The attorneys in fact so regarded it, and for that reason had the deeds executed separately. That is the only ground upon which the execution of two separate deeds can be reasonably explained.

The long and short of this whole proceeding, is that Barbee T. Blackburn considered that he had bound himself to convey this land to respondent, and wanted to evade the fulfillment of the contract in such a way as not to lay himself liable to an action for damages, and believed that by having his wife, Sadie M. Blackburn, refuse to sign the deed, he could induce respondent to refuse to accept the deed; but respondent, having been apprised of all the facts in regard to the title, accepted the deed of Blackburn for his half, and that gentlemen was caught in the trap he had set for respondent.

Upon whom was the fraud practiced by respondent, if there was any fraud? The evidence shows that all the talk had in regard to the deed from Sadie M. Blackburn

to respondent was had between Jameson and Cheatham, the agent of Sadie M. Blackburn; and that not one word passed between Westfall, the agent of Barbee T. Blackburn, and Jameson, or any one else, on that subject. Sadie M. Blackburn cannot then be heard to complain, for she had no interest in the land, and so far as there was any contract with her it was void for want of consideration.

And in what way can Barbee T. Blackburn be heard to complain? The evidence does not show that any false representations were made to his agent Westfall. His agent Westfall executed the deed and accepted the money, and then went and purchased a draft to send to Blackburn. Neither did he object to the delivery of the deed by Irwin, and stood silently by when Judge Irwin remarked that the Blackburn deed now belonged to Wooding. He did not even offer to return the money and demand a return of the deed when he ascertained that respondent's agent did not intend to take the deed from Sadie M. Blackburn. He says he would not have executed the deed had he known that respondent did not intend to take the deed from her and pay her therefor the sum of $11,489, and

yet he does not say there was a single representation made to him that they were to do so. Was Westfall in any way deceived by false representations made by respondent? There is nothing in the evidence to show that fact, and the evidence is overwhelming against the theory advanced by complainants, that Westfall made no delivery of the deed. As to the right of Barbee T. Blackburn to recover for having been misled by representations not made for him, see—

*Wells vs. Cook*, 88 Am. Dec. 436.

Possession of a deed has ever been considered one of the strongest evidences of ownership, and only clear and convincing evidence can overcome this presumption.

*Tunnison vs. Chamberlain*, 88 Ill. 379.

*Simmons vs. Simmons*, 78 Ala. 365.

The proof may be overcome by proof of fraud, but the proof must be clear and explicit.

*Cover vs. Manaway*, 115 Pa. St. 338.

Of what injury is complainant Sadie M. Blackburn complaining? She has been deprived of nothing. True, she failed to obtain $11,489 from respondent; but she was

never entitled to any amount whatsoever, and has no right to be here asking for the cancellation of this deed, for she has no interest in the land in controversy; and whatever representations were made to her or her agent can in no wise affect the rights of the parties to this action, as she was not a party in interest.

Respondent desires to call the attention of the court, in reviewing the evidence, to the fact that all the negotiations complained of and not carried into effect were between the agent of complainant Sadie M. Blackburn and the agent of respondent or the broker, and not between the agent of respondent and complainant Barbee T. Blackburn, the then owner of the undivided one-half interest in this tract of land. If the court will bear this in mind during the consideration of all the evidence, it will have no trouble in digesting the mass of testimony, and can reach no other conclusion than that the opinion of Judge Hanford should be sustained.

As to the question of the sufficiency of the correspondence between Jameson & Company and Barbee T. Blackburn to constitute a contract, the lower court should also

be sustained. It is not necessary to the validity of a contract in writing sufficient to meet the requirements of the statute of frauds that it should all be in one piece, but may be composed of a number of separate papers.

*Wilson vs. Taylor Mfg. Co.* (Miss.), 7 So. Rep. 356.

*Greeley Burnham Grocer Co. vs. Capen*, 23 Mo. App. 301.

*Ryan vs. U. S.*, 136 U. S. 68.

Especially is this true where the contract consists of communications by mail and telegraph.

*Otis vs. Payne*, 86 Tenn. 663; 8 S. W. 848.

*Lee vs. Cherry*, 85 Tenn. 707; 4 Am. St. Rep. 800.

The description of the land in the communications is also sufficient.

*Quinn vs. Champagne*, 38 Minn. 323; 37 N. W. 351.

*Hollis vs. Burgess*, 37 Kan. 494; 15 Pac. 536.

*Lasher vs. Gardner*, 14 West. 392; 16 N. E. 919.

If the communications, etc., found in the testimony of Jameson were sufficient to constitute a contract that could

be enforced, then the complainants cannot recover; for if respondent had a right to have the contract fulfilled, then complainants were not damaged, for so far as the same affected them it was immaterial whether the fulfillment was obtained by fraud or by a decree of court. The fact that Barbee T. Blackburn owned only an undivided one-half interest in the land made no difference on the right of respondent to have the contract enforced so long as the exact value of his interest could be ascertained, in order to make the proper abatement from the contract price.

*Marshall vs. Caldwell*, 41 Cal. 611.

*Wright vs. Young*, 6 Wis. 127; 70 Am. Dec. 463.

Complainant never notified C. E. Jameson or respondent that he considered their negotiations at an end; but throughout the whole proceeding of the execution of the deed his agent recognized the existence and continuation of the contract to sell the land for $6,000.

The foregoing argument covers the fourth assignment of error, and we will not consider it separately. The evidence, we think, clearly settles the question that the complainant Sadie M. Blackburn has no right to be heard

in this action, and that Barbee T. Blackburn's hands are too badly soiled with fraud on his part to entitle him to the relief sought, even if the representations charged were true.

O. V. LINN,

*Solicitor for Respondent.*